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Supreme Court, U. S.
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No. 97-1137

In The

# Supreme Court of the United States

October Term, 1997

CYPRUS BAGDAD COPPER CORPORATION; CYPRUS AMAX MINERALS COMPANY; RANDY SCOTT, husband; JANE DOE SCOTT, wife; GARY HUTCHINSON, husband; KATHLEEN HUTCHINSON, wife, aka JANE DOE HUTCHINSON; JANETTE BUSH, wife; JOHN DOE BUSH, husband; JOSEPH MORTIMER, husband; JANE DOE MORTIMER, wife; JACK McKEON, husband; JANE DOE McKEON, wife; PAUL AUSTIN, husband; JANE DOE AUSTIN, wife; RAYMOND BRAMLETT, husband; JANE DOE BRAMLETT, wife; LLOYD FLANNIGAN, husband; JANE DOE FLANNIGAN, wife,

*Petitioners,*

v.

MELTON NELSON; LANITA NELSON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## SUPPLEMENTAL APPENDIX

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| MELTON W. NELSON, et al., Plaintiffs, v. CYPRUS BAGDAD COPPER CORP., et al., Defendants. | CIV 95-0237-PCT-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed Sept. 19, 1995) |

On December 23, 1994, Plaintiffs brought this employment discrimination [sic] pursuant to the Americans with Disabilities Act of 1990 ("ADA") and the Arizona Civil Rights Act. Plaintiffs named as defendants Cyprus Bagdad Copper Corporation and Cyprus Amax Minerals Company (collectively referred to as "Cyprus") and several of its employee [sic].[1] Plaintiffs allege: wrongful discharge (Count I); breach of contract (Count II); breach of implied covenant of good faith and fair dealing (Count III); violation of the ADA (Count IV); violation of the Arizona Civil Rights Act (Count V); defamation (Count VI); tortious interference with contractual relations (Count VII); and intentional infliction of emotional distress (Count VIII).

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[1] Plaintiffs also named Jane Doe Scott, Jane Doe Hutchison, John Doe Bush, Jane Doe Mortimer, Jane Doe McKeon, Jane Doe Austin, Jane Doe Bramlett, and Jane Doe Flannigan in accordance with Arizona's community property laws. According to the Court's Rule 1.9(d), all Doe defendants are dismissed without prejudice. *See* Rules of Practice of the United States District Court, District of Arizona, 1.9(d) (1994).

Pending before the Court is Defendants' Motion for Summary Judgment of counts I, II, III, IV, V, and VI. On September 11, 1995, the Court held a hearing for oral argument on the motion. Because Plaintiffs submitted an unsigned affidavit in response to Defendants' motion, the Court granted Plaintiffs an additional five (5) days within which to cure the defect. Plaintiffs timely filed a signed and notarized affidavit and Defendants' Motion for Summary Judgment is now ready for review.

## I. FACTUAL BACKGROUND

Plaintiffs allege the following facts. Nelson was a full-time employee of Cyprus for approximately nineteen (19) years. Prior to termination, Nelson worked the day shift as a Senior Maintenance Technician in the Mine Electrical Department. In August of 1994, Cyprus planned to re-organize the company, announced its intent to lay off over one hundred (100) employees, and offered its employees the option of volunteering to be laid off with a severance package. Nelson asked his maintenance manager, Defendant Hutchison, how the Mine Electrical Department would be affected by the re-organization. Hutchison informed Nelson that no major changes were planned for Nelson or the Department. Nelson did not volunteer to be laid off.

After the deadline for volunteering, Defendant McKeon informed Nelson that he would have to work 12-hour rotating shifts. Nelson informed McKeon that Nelson previously had medical problems with working a 12-hour rotating shift. Nelson was thereafter medically examined by Cyprus's physician, who recommended that

psychological and psychiatric testing may help to diagnose the problem. On September 30, 1994, Cyprus placed Nelson on suspension and on October 11, 1994, terminated Nelson's employment. Nelson thereafter appealed his termination to Defendant Scott, Cyprus's General Manager, who affirmed the termination. Nelson did not appeal the denial to an arbitrator.

Nelson thereafter became employed by an independent contractor, Dan McIntyre, who does contract work for Cyprus. McIntyre terminated Nelson's employment.

## II. STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1995); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Substantive law determines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* The dispute must also be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Id.* at 317. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-88 (1986).

## III. DISCUSSION

Plaintiffs claim that at the time Cyprus terminated Nelson's employment, there existed several positions in the Department that did not require a rotating shift and for which he was qualified. Plaintiffs also claim that Defendants pressured or otherwise caused McIntyre to terminate Nelson's subsequent employment. Defendants argue that all of Plaintiffs' claims are barred because Nelson failed to address the claims through the "Problem Solving Process" outlined in Cyprus's employee handbook. In the alternative, Defendants move to dismiss Count I through V as against all individual Defendants as improper parties and to dismiss Count VI against all Defendants as a matter of law.

### A. *Employee Handbook*

Arizona courts have long recognized that an employee handbook may be incorporated into an

employment contract. *e.g., Liekvold v. Valley View Community Hosp.*, 688 P.2d 170, 171 (Ariz. 1984). Cyprus's Employee Handbook, which became effective on July 1, 1993, contains grievance procedures for resolution of employment related disputes. According to the Employee Handbook, an aggrieved employee may: (1) informally pursue a complaint through an "open door" policy ("Open Door Policy") or (2) formally file a written complaint with the supervisor, department manager, or vice president through the Complaint Resolution Policy, and, if necessary, appeal to arbitration ("Complaint Resolution Policy"). Bush Aff., Ex. A (Employee Handbook), at 10-13. According to the Handbook:

> The Open Door Policy and the Complaint Resolution Policy are the sole and exclusive procedures for resolving [sic] "[sic] any problem, controversy, complaint, misunderstanding or dispute between an employee and Cyprus Bagdad. This includes any claim that the provisions of this Handbook have been violated and any claim that any state or federal statute or law applicable to your employment has been violated.
>
> You are precluded from filing any action in any court concerning any matter which could have been addressed through these procedures.

*Id.* at Ex. A, at 10, 57.

B. *Arbitrability of Plaintiffs' Discrimination Claim*

Plaintiffs argue that the arbitration clause in the Employee Handbook is not enforceable as against public policy. Plaintiffs also argue that even if the arbitration clause applies, Nelson did not knowingly and voluntarily

waive his rights to bring these claims. *See* Nelson Aff., at ¶ 2.

The Federal Arbitration Act ("FAA") provides that:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). Section 1 of the FAA, however, exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1. The FAA also provides for a stay of judicial proceedings where an issue may be referred to arbitration or where a party has failed to comply with the arbitration agreement. *Id.* § 4.

A party claiming that a claim is not arbitrable despite the requirement of arbitration in an employment contract has the burden of establishing that Congress intended to exclude the claim from the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). In *Gilmer,* a case pursuant to the Age Discrimination in Employment Act ("ADEA"), the United States Supreme Court addressed whether the FAA prohibits compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application. *Id.* at 1650. Recognizing that "the federal policy favoring arbitration," the Court rejected the plaintiff's argument that enforcing arbitration agreements would be inconsistent with the public policy in enforcing the ADEA. *Id.* at 1652-53. The Court

also recognized that enforcement of arbitration agreements is consistent with Congress's intent to permit "informal methods of conciliation, conference, and persuasion." *Id.* at 1654 (citing 29 U.S.C. § 626(b) referring to the Equal Employment Opportunity Commission). The Court did not, however, directly address whether § 1 of the FAA excludes all "contracts of employment." *Id.* at 1651 n.2.

Plaintiffs rely on the Sixth Circuit Court of Appeals's decision in *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991). In *Willis*, the defendant sought to compel the plaintiff to arbitrate her sexual discrimination claim pursuant to the arbitration clause included in the plaintiff's securities registration application. *Id.* at 306. In reversing the trial court's denial of the defendant's motion to compel, the court interpreted *Gilmer* to note that all employment contracts with employers who are subject to Title VII or other anti-discrimination statute fall within the meaning of the exempted "contracts of employment" under § 1. 948 F.2d at 311. The court found that because the anti-discriminatory statutes were enacted pursuant to Congress's power to regulate interstate commerce, any employer subject to the statute would necessarily engage in interstate commerce and fall within the exclusion of "contracts of employment" under § 1. *Id.*

The Ninth Circuit has not directly addressed whether all employment contracts are exempted from the FAA.[2] The Ninth Circuit, however, favors arbitration and requires courts to "rigorously enforce agreements to arbitrate" with "any doubts concerning the scope of arbitrable issues . . . resolved in favor of arbitration." *See Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 971 (9th Cir. 1992) (citations and internal quotations omitted). Recently, in *Prudential Ins. Co. of America v. Lai*, the Ninth Circuit reversed a district court's order compelling arbitration of sexual discrimination claims because the plaintiff did not knowingly enter into the arbitration agreement. 42 F.3d 1299 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3861 (May 22, 1995). In its analysis, the court discussed the arbitrability of statutory claims and recognized that pursuant to *Gilmer*, the Ninth Circuit has extended the arbitrability of Title VII employment discrimination and parallel state statutory employment discrimination claims. *Id.* at 1303, 1303 n.1. (citations omitted). Indeed, the court unequivocally noted that although "[t]he issue before us . . . is not whether employees may ever agree to arbitrate statutory employment claims; they can." *Id.* The Court therefore concludes

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[2] Plaintiffs submitted a supplemental list of authority citing *Graham Oil v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994). *Graham Oil* addressed the validity of an arbitration clause in a distributor agreement, not an employment agreement. The *Graham Oil* court held that the arbitration clause was invalid because the clause specifically limited the provisions of the Petroleum Marketing Practices Act. 43 F.3d at 1249. As such, *Graham Oil* is limited to its facts and does not address the broader question of whether all employment agreements are exempted from the FAA.

that the arbitration clause in the Employee Handbook is enforceable so long as Nelson knowingly waived his right to file a judicial claim. *See id.; see also Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO,* 739 F.2d 1159, 1162 (7th Cir.), *cert. denied,* 469 U.S. 1160 (1984) ("contracts of employment of . . . workers engaged in foreign or interstate commerce" is limited to workers employed in transportation industries). Accordingly, Plaintiffs' failure to comply with the arbitration clause may act as a waiver so long as Plaintiffs knowingly and voluntarily waived the right to a [sic] instituting a judicial claim. *See Prudential Inc.,* 42 F.3d at 1305.

Plaintiffs argue that Nelson did not knowingly waive his right to file a statutory discrimination claim. Plaintiffs claim that at the time Nelson received the Handbook, Cyprus did not inform him that he would be waiving his right to bring a statutory discrimination claim. Plaintiffs also claim that Nelson was not aware that he would be precluded from commencing this action. *See* Nelson Aff., at ¶ 3. Nelson attests that he was at no time "informed . . . that failure to submit [the] claim to arbitration precluded [him] from filing a statutory discrimination claim." *Id.* at ¶ 4.

Defendants presented evidence demonstrating that Nelson received the Employee Handbook containing the arbitration clause prior to its effective date. *See* Bush Aff., Ex. B. When Defendant Scott denied the appeal, he advised Nelson that he must appeal to arbitration within ten (10) calendar days of receiving the denial. *Id.* at Ex. D. Defendant Bush also reminded Nelson of his obligation to appeal to arbitration. Bush Aff., at ¶ 14. Bush further attests that Nelson advised her "that he would not appeal

to arbitration based on the advice of his attorney." *Id.* at ¶ 14.

Although Nelson disputes that Ms. Bush informed him of the arbitration requirement, Plaintiffs present no specific evidence to contradict Defendants' facts. Nelson's affidavit, however, is cursory and conclusory. Such an affidavit, without more, is insufficient to defeat a summary judgment motion. *See* Fed. R. Civ. P. 56(e); *Matsushita,* 475 U.S. 585-88. Accordingly, no genuine issue of material fact exists regarding whether Nelson knowingly and voluntarily waived his rights to file a statutory discrimination claim. Absent specific facts creating a genuine dispute, the Court finds that Nelson knowingly and voluntarily agreed to the arbitration clause. Mere allegations and general argument are insufficient to defeat a motion for summary judgment. *See Matsushita,* 475 U.S. at 585-88. Accordingly, the Court finds as a matter of law that Plaintiffs are subject to the arbitration clause contained in the Employee Handbook. *See Bennett,* 968 F.2d at 971. Accordingly, Defendants are entitled to summary judgment of counts I through VI. *See Celotex* 477 U.S. at 322-23.

C. *Jurisdiction over Counts VII and VIII*

Counts VII and VIII are based on state law. According to the Complaint, Plaintiffs are residents of Arizona. Although Defendant Cyprus is a Delaware corporation, doing business in Arizona, all remaining Defendants are residents of Arizona. *See* Compl., at 3-6. Therefore, complete diversity does not exist between the parties. Absent complete jurisdiction, the Court has no subject matter

jurisdiction over state law claims. *See* 28 U.S.C. § 1332 (1994). Therefore, the Court dismisses counts VII and VIII for lack of subject matter jurisdiction.

## IV. CONCLUSION

Based on the foregoing reasons, the Court finds it unnecessary to address Defendants' alternative motion to dismiss counts I through V as against all individual Defendants as improper parties and to dismiss Count VI against all Defendants as a matter of law.

**IT IS THEREFORE ORDERED** Defendants' Motion for Summary Judgment is GRANTED as to counts I, II, III, IV, V, and VI. **(DOC #18).**

**IT IS FURTHER ORDERED** count VII and VIII are dismissed for lack of subject matter jurisdiction.

DATED this 18 day of September, 1995.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record